BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

NOEL ROYER)	
Claimant)	
VS.)	
) Docket No. 247,	264
PAYLESS SHOESOURCE)	
Respondent)	
AND)	
)	
FIREMAN'S FUND INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appeal from an Order entered by Administrative Law Judge Brad E. Avery on December 30, 1999.

ISSUES

Respondent's application for review describes the issues as: (1) whether the injury alleged by claimant arose out of and in the course of his employment and (2) whether the temporary partial disability benefits are properly attributed to this [August 2, 1999] date of accident. Respondent's brief describes the issue differently:

The employer and insurer's defense was that the condition complained were not causally related to this employment, but rather resulted from an earlier injury that occurred prior to this insurer's coverage period.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Order should be affirmed.

Claimant developed hip problems in the course of performing duties for respondent. He first sought and received medical treatment in March 1999. Claimant was sent to the emergency room and for a period placed on light duty. On August 2, 1999, after claimant had returned to full duty, claimant's hip symptoms worsened while he picked boxes off a track and loaded them on a semitrailer. Respondent again sent claimant to the emergency room and from there claimant was referred ultimately to Dr. Michael L. Smith, an

orthopedic surgeon. At the time of the preliminary hearing, claimant had not returned to work for respondent but was working part time as a bus driver.

It is not entirely clear whether respondent denies claimant had any injury arising out of and in the course of employment or only denies that it occurred after April 1, 1999, when the current insurance carrier assumed coverage. The distinction is significant because the latter argument does not raise a jurisdictional question and is, therefore, not subject to review at this stage. *Carpenter v. National Filter Service*, Docket No. 81,106 (Kan. App. 1999).

If the respondent is arguing claimant had not suffered accidental injury arising out of and in the course of employment, this issue is a jurisdictional issue and is subject to review. K.S.A. 44-534a. The Board finds the evidence does establish claimant suffered accidental injury arising out of and in the course of employment through August 2, 1999. This conclusion is supported by claimant's testimony and the report from Dr. Sergio Delgado. Dr. Delgado stated in his report of October 27, 1999:

It is my conclusion that his injury of August 2, 1999, is a continuum of his symptoms which were record [*sic*] starting on March 15, 1999, and can be considered to be an aggravation of a condition related to the job duties performed until August 2, 1999.

Finally, respondent contends any aggravation through August 2, 1999, should be attributed to March 15, 1999, because claimant violated restrictions and, in fact, did not inform respondent of restrictions. Claimant disputes this contention. While respondent's insurance carrier might, if this contention is correct, find it frustrating to be obligated for an injury that might have been avoided, the Board does not consider this argument relevant, in what is generally a no-fault system, to either whether or when claimant suffered injury.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Brad E. Avery on December 30, 1999, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.		
Dated this day of Febr	uary 2000.	
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BOARD MEMBER

c: Beth Regier Foerster, Topeka, KS Eric T. Lanham, Kansas City, KS Brad E. Avery, Administrative Law Judge Philip S. Harness, Director